No. 85-495 (16)



IN THE

# Supreme Court of the United States

October Term, 1985

**ANSONIA BOARD OF EDUCATION,**
*Petitioner,*

**v.**

**PHILBROOK,**
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE RESPONDENT

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The Rutherford Institute and its corresponding State Chapters, pursuant to Supreme Court Rule 36.3, hereby move for leave to file a brief as *amici curiae* in support of the Respondent in this case and for affirmation of the decision of the United States Court of Appeals for the Second Circuit. The Respondent has consented to the filing of this and his letter of consent has been filed with the Clerk pursuant to Rule 36. The motion is necessitated by Petitioner's refusal to consent to the filing of the appended brief.

*Amici Curiae* are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The

Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. Previous cases in which *amici curiae* have filed briefs with the Court include: *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984); *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985); *Witters v. State of Washington Commission for the Blind*, 54 U.S.L.W. 4135 (U.S. Jan. 27, 1986) (No. 84-1070); *Bowen v. Roy*, (No. 84-780); *Bender v. Williamsport Area School District, et al.*, (No. 84-773), slip. op. (March 25, 1986); *Goldman v. Secretary of Defense, et al.*, (No. 84-1097), slip op. (March 25, 1986); *Bowers v. Hardwick*, (No. 85-140); *Bowen v. American Hospital Association, et al.*, (No. 84-1529); *Ohio Civil Rights Commission v. Dayton Christian Schools*, (No. 85-488). The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

The issues presented in this case concern the entitlement of an employee to an accommodation by his employer allowing him the freedom to live according to the dictates of his religious beliefs. Specifically, the question arises as to what burden is incumbent upon the employer in a claim of religious discrimination under Title VII to reasonably accommodate the religious observances of the employee. A careful review of the legislative history and judicial construction of Title VII's prohibition of religious discrimination points inescapably to the conclusion that the employer has an affirmative duty to accept any reasonable accommodation proposed by the Respondent that would significantly minimize the burden upon Respondent's religion.



It is the position of the Rutherford Institute that only by imposing on employers the qualified affirmative duty to accept a reasonable alternative to burdening an employee's religion can this country's commitment to a modicum of religious pluralism be fulfilled in the workplace. Any lessening of this affirmative duty and corresponding burden on the employer in a Title VII case would pose a significant threat to traditional notions favoring protection of the employee in the practice of his religious faith.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of the Rutherford Institute and its corresponding State Chapters for leave to file this brief as *amici curiae* in support of the Respondent be granted.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE[1]

*Amici Curiae* are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens

[1]Respondent has consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The Petitioner has withheld consent to the filing of this brief and that action is the subject of a Motion for Leave to File, timely presented, in accordance with Rule 36.3 of the Rules of the Supreme Court.

dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

Because of its acute sensitivity to violations of the freedom of religion, the Rutherford Institute has increasingly become one of the nation's most effective and responsible commentators in this important field. Moreover, counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

*Amici Curiae*, therefore, have a vital interest in seeking affirmance of the lower court's decision. Reversal of the lower court's decision would significantly vitiate the salutary effect of Title VII in sustaining a modicum of religious pluralism in the workplace.

## STATEMENT OF FACTS

*Amici Curiae* adopt by reference the statement of facts as set forth in Respondent's brief filed with this Court.

## SUMMARY OF ARGUMENT

The allocation of the burden of proof effected by the definition of the *prima facie* case operates to impose an evidentiary presumption. Indeed, the very requirement of the *prima facie* case establishes a presumption in favor of non-discrimination by employers. The higher the standard



of proof required to establish that *prima facie* case, the stronger the presumption. Because it operates as an evidentiary presumption, the definition of the *prima facie* case is ineluctably tied to social norms, to views concerning the normal state of affairs with respect to religious discrimination by employers. The mere existence of a statutory duty or positive norm says nothing in and of itself regarding the nature of this presumption. Nevertheless, taking into account the context of the 1972 amendments to Title VII, it makes sense to infer a relatively low standard of proof, which would not, in any case, require employees to establish the reasonableness of particular proposed accommodations as a part of the *prima facie* case.

On the substantive issue, Petitioner school board has advanced a view of the statute that is clearly underinclusive with respect to the range, as opposed to the degree, of accommodation intended by Congress. The tendency is to approach this question as if it required a qualitative judgment as to the degree of accommodation required. The normal approach assumes a continuous spectrum of alternatives, ranging from purely prohibitive to wholly affirmative constructions of the statute, with the choice of a decisional point being solely a qualitative issue. However, when viewed at a reasonable level of abstraction, the spectrum is significantly discontinuous, and thus provides a basis for a categorical approach. This approach makes it possible to sort different proposed constructions of the statute without resorting to untutored qualitative judgments; applying this approach to the present case reveals that congressional intent requires Petitioner to accommodate Respondent by allowing him to use the personal business category for his religious observance.

# ARGUMENT

## I

### The Standard For Defining An Employee's *Prima Facie* Case Ultimately Depends Upon Social Rather Than Positive Norms, Though It Is Subtly Affected By The Nature Of The Statutory Requirement

The *prima facie* case defines the threshold for shifting the burden of proof to an employer. How high this threshold should be depends upon certain policy considerations, as well as on an understanding of what one counts as religious discrimination. The policy considerations have to do with allocating the burden of proof between the parties; one's understanding of religious discrimination affects the nature of the burden.

#### A. The Connection Between Social Norms, Positive Norms And Evidentiary Presumptions.

No matter how high one conceives the substantive standard in a religious discrimination case to be, there is in theory no reason that the employee's burden could not be minimal.[1] It could in some contexts even be reasonable to place the whole burden upon the employer. What is and is not reasonable depends, in particular, upon a prior understanding of the normal relationship of employer and employee in our society with regard to issues of religious pluralism. A rule allocating some initial burden to the employee suggests a prior understanding that the norm,[2]

[1]It is possible to have a high substantive standard with regard to the existence of religious discrimination, but at the same time to require only a minimal showing to establish a *prima facie* case. A high substantive standard would simply make it easier for the employer to rebut the case made out by the employee.

[2]We refer here to the social, as opposed to the moral or positive, norm. The positive norm is what the substantive rule requires. By hypothesis, no case of religious discrimination could be made apart from violation of the positive norm. The social norm reflects our



however frequently violated,[3] is non-discrimination by employers. In such a case, we would want some, if only minimal, evidence that the employer had not departed from this norm before we would require proof from him that he had not. A rule placing the initial burden on the employee reflects a policy of deference toward employers in that it requires employees to identify some reasons for believing that an employer has departed from the norm. The burden of proof reflects, in short, a presumption of regularity.

Qualitatively, the severity of the employee's burden would vary inversely with the strength of this presumption. An awareness that employers not infrequently departed from the social norm, that it was in a sense an ambiguous, if not illusory, norm, would weaken this presumption and support a relaxation of the standard of proof to which we would put the employee.

The degree of deference that is appropriate, though derived from social norms, is subtly affected by the nature of the statutory requirement. Two different views of the statute may be seen, though they have not been formally

*(footnote 2 continued)*
understanding of the degree of consonance between the positive norm and the actions of employers in our society. A substantial divergence between the positive and social norm is politically unlikely because a society in which employers routinely flouted the positive norm would, in all likelihood, not long retain it as the norm. Such a state of basic dissonance could exist, however, if employers were a political minority. In such a state, it would be reasonable, as well as politically feasible, to impose most, if not all, of the burden upon the employer. By contrast, a state of basic consonance between the positive and social norm would lead to a rule that imposed some burden of proof on the employee. Other things being equal, the greater the consonance, the greater the burden upon the employee to demonstrate a departure from the positive norm. Obversely, where the consonance is somewhat weak, the standard for assessing the burden to be placed upon the employee should be relaxed.

[3]Obviously, the norm would at some point cease to be a social norm if it were too frequently violated. The point here is that, so long as it remains a norm, some burden will be imposed upon employees.

elaborated, in the various lower court decisions attempting to give meaning to the statute. On the one hand, the statute may be viewed primarily as a prohibition, as establishing what an employer may *not* do. *Cf. Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). That is, the employer may not single out religious employees for discrimination. On the other hand, one may view the statute as establishing to some extent an affirmative obligation to provide for a modicum of religious pluralism in the marketplace. *E.g.*, *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985). These two different views lead directly to different conclusions as to what the statute requires from employers as a substantive matter. The effect on the resolution of the burden of proof allocation is less direct, but equally obvious, once the connection between the burden of proof and social norms is perceived.

The view of the statute as merely a prohibition of religious discrimination clearly leads to a stronger presumption in favor of the employer, and therefore tends toward allocation of a greater initial burden to the employee than does an affirmative view of the statute. This is because violations of a prohibitive standard would impinge more sharply on social norms than violations of an affirmative standard. An employer singling out religious employees for discrimination would seem, from the standpoint of social norms, to be quite aberrant; we would be much less surprised to find that an employer had failed affirmatively to accommodate the idiosyncrasies of a religious employee. Hence, one who holds the former view would tend to require a fairly strong showing of discrimination from an employee. By the same token, one who holds the latter view would tend to accept somewhat less of a showing.

Although the emphasis of the original enactment was on "eliminating discrimination in employment," *TransWorld Airlines, Inc. v. Hardison*, 423 U.S. 63, 71 (1977), the 1972 amendment to the definition of religion,



following this Court's decision in *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971), shifted the emphasis to an affirmative duty. As this Court put it, "[t]he intent and effect of this definition was to make it an unlawful employment practice under Section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74. Resolving the double negative in the above formulation, the "intent and effect" of the 1972 amendment was, quite plainly, to convert[4] the statute from a purely prohibitive measure into one with an affirmative cast.

The social norm with regard to this affirmative duty is plainly problematic; the affirmative cast of the statute thus significantly weakens the presumption in favor of employers, which is to say that it weakens the presumption against an employee claim of religious discrimination. Accordingly, as a general qualitative matter, this suggests a relatively low threshold of proof for establishing a *prima facie* case. Knowing that the threshold should be relatively low does not, by itself, enable one to specify the precise elements of a *prima facie* case, but it does provide a backdrop against which contending formulations can be considered.

B. The Possible Elements Of The *Prima Facie* Case.

The elements of the *prima facie* case can be distilled out of the essential ingredients of a religious discrimination claim. Such a claim presupposes a conflict between an employee's religious beliefs, including for this purpose any

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[4]It might be argued that the pre-1972 statute was also intended to impose an affirmative obligation, and that the 1972 amendment was added merely to clarify that intent, and thus to resolve the uncertainty surrounding this Court's affirmance of the Sixth Circuit Court of Appeals decision in *Dewey v. Reynolds Metal Co.*, 429 F.2d 325 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). For the purposes of the present argument, one's view of this historical issue is unimportant.

course of action impelled by these beliefs, and some requirement of his job. A claim of religious discrimination arises out of the dynamics of the resolution of such a conflict. There are three possibilities as to how such a conflict could be resolved without burdening an employee's religion. First, it could in some cases be resolved by the unilateral actions of the employee working within the system to finesse the conflict. *Cf. Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977) (employee has obligation to accommodate his own beliefs through means available to him). Second, the employer might be able to accommodate the employee, without itself being burdened, by tailoring the requirements of the system to allow for the employee's religious belief. Third, the employer could incur a burden in order to accommodate the employee.

A claim of religious discrimination is, in essence, a denial of the first possibility combined with a claim either that the employer was aware of and refused or otherwise failed to allow the employee to take advantage of a possibility of the second type, or that the employer should have made an accommodation of the third type. As will be argued further below, it seems clear that the statute requires the employer to allow an employee an accommodation, if such is known to the employer, of the second type. Moreover, based on this Court's decision in *Hardison*, and on the purport of the statute, it also seems clear that the statute may require at least some accommodations of the third type.[5]

The possible elements of a *prima facie* case break out quite naturally from the composite religious discrimination claim sketched above. Without question, this burden would entail a showing that (1) the employee has a sincere religious belief that conflicts with an employment require-

[5]Specifically, the *Hardison* decision would seem to require employers to accommodate employees to the extent of *de minimis* costs. *Hardison*, 432 U.S. at 84.



ment, (2) the employer has informed the employee of the conflict and (3) the employee has incurred a burden on his religion as a result of his noncompliance. *See e.g., Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985). *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978). *See also*, Note, *Employer's Duty of Reasonable Accommodation Under Title VII - Pinsker v. Joint District No. 28J*, 33 Kans. L. Rev. 583, 584-85 (1985). The issue is whether the employee's burden should also include proof that the employer reasonably could have arranged specific forms of accommodation, but did not, and that these accommodations would have either eliminated or at least significantly minimized the burden on the employee's religion. The alternative would be to place the burden on the employer to show that no reasonable means of accommodating the employee were available.

It is important for this purpose to distinguish between the necessity of making allegations and the burden of proof. The employee must *allege* facts establishing that his employer could have accommodated him. The question is whether the employee should have to shoulder the burden of proving the practicability and reasonableness of such accommodations, or whether, on the other hand, the employer should have the obverse burden of showing that the alleged accommodations were not reasonably practicable.

### C. The Impact Of The Affirmative Cast Of The Statute On The Allocation Of The Burden Of Proof.

The statute does not directly answer this question; it defines religious discrimination, but it does not purport to

allocate the burden of proof.[6] The answer must come, rather, from a consideration of policy, and that consideration must refer to social norms with regard to the requirement at issue.

It is nevertheless tempting to conclude that because the statute imposes an affirmative duty upon the employer, it is up to the employer to show that he has complied. Indeed, it would seem somewhat anomalous in light of the statutory intent to impose such a duty on employers to require employees to carry the burden of proof on this issue. Yet it does not follow from the bare fact that employers have a duty that they also have the burden to prove they have fulfilled it. The burden of proof plays the role of asserting an evidentiary presumption, of defining what is felt to be the ordinary state of affairs. Hence, depending upon how normal it is for an employer to affirmatively accommodate religious pluralism, it could well be consistent to recognize such a duty, and at the same time to impose a stiff burden on employees to prove non-compliance. If, on the other hand, the statute is seen as calling employers to a higher standard of accommodation than they naturally practiced in the past, then it could not be assumed that fulfillment of the duty was the norm. In such a case, it would make better sense to allocate the burden of proof in a way that buttressed the imposition of the duty.

Although the norm with respect to employer accommodation of employee religious practices is somewhat

[6]The statute does seem at first blush to speak to this issue. Specifically, the statutory definition of religion includes within the term religion, "all aspects of religious observance and practice . . . unless an employer *demonstrates* that he is unable to reasonably accommodate to an employee's or prospective employee's religious observances or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. Section 2000e(j). Although the quoted language appears to answer this question, it is probably best interpreted as setting forth a substantive definition of religious discrimination, and not as attempting to allocate the burden of proof. Of course, if the statutory language is meant to describe the burden of proof allocation, then it is clear that the employer has that burden.



problematic, the 1972 amendments evince Congress's intent to call employers to a higher standard of accommodation. The purpose of the changes was not, to be sure, to require employers to bear greater burdens on behalf of religious employees. Rather, its purpose was to require them to be more scrupulous and creative in structuring nonburdensome accommodations.

A presumption that employees have been scrupulous in structuring accommodations hardly comports with the view of social norms that informed the design of the statute. Yet to make proof of the reasonableness of particular accommodations a part of the employee's *prima facie* case is to impose precisely such a presumption. It is, thus, clearly in keeping with the statutory scheme to impose the burden of proof upon the employer with respect to the viability of particular accommodations.

In the instant case, therefore, proof that Respondent was denied paid leave should be, as the Court of Appeals found, *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483 (2d Cir. 1985), sufficient to establish a *prima facie* case of religious discrimination. It should not be necessary for Respondent to prove, as an aspect of his *prima facie* case, that the school could reasonably have provided him with paid leave. Rather, Petitioner school board should have the burden of showing why such an accommodation was not reasonable.

## II

### The Nature Of Title VII's Accommodation Requirement Is Best Understood Not Merely In Qualitative Terms, But In Terms Of A Spectrum Of Competing Primary Functions.

The logic of Title VII's prohibition of religious discrimination, considered in light of congressional intent, clearly requires Petitioner to accept any reasonable accommodation proposed by Respondent that would significantly minimize the burden upon Respondent's religion, so long

as that accommodation would not cause Petitioner undue hardship. As discussed above, Congress intended Title VII to impose an affirmative duty and not merely to serve a prohibitive function.

### A. The Possible Functions Of Title VII Can Be Elaborated Into Four Analytically Distinct Versions Or Categorical Interpretations Of The Statute, Which Make It Possible To Sort Proposed Understandings Of The Accommodation Requirement Without Resorting To Rough Qualitative Judgments.

The prohibitive-affirmative distinction, without more, imports a significant limitation on the range of meanings that otherwise could be assigned to the statute. Yet the source of this distinction furnishes a basis for additional and somewhat more precise distinctions that can be applied to narrow the range of legitimate meanings even further. The possible meanings of the statute are associated with an underlying spectrum of possible functions intended to be served by the statute, stretching from a purely prohibitive function on the one extreme, to a wholly affirmative commitment on the other. Neither extreme is, of course, what Congress intended.

The principal problem posed by the religious discrimination cases is thus typically thought to be one of making a qualitative judgment as to how far, within these extremes, an employer should be required to go in accommodating religious employees. In terms of the spectrum, this amounts to attempting to identify a point on the spectrum that corresponds to congressional intent. Framed in this way, the problem is virtually intractable, because what little legislative history exists is nowhere near detailed enough to afford a basis for such a precise discrimination. The tendency is, therefore, to suspend analysis in favor of raw judgment.

While it is not possible to make a precise qualitative judgment on the basis of the extant legislative materials,



neither is it necessary in the majority of cases, including the present one. It is possible, and at the same time sufficient, to identify more precisely the boundaries within which judgment may legitimately proceed. The typical approach mistakenly proceeds as if such cases posed the problem of locating a decisional point on a continuous spectrum. In fact, the spectrum is, when viewed at a reasonable level of abstraction, significantly discontinuous. Specifically, it breaks down naturally into four primary[7] "bands,"[8] or ranges of possibilities.

Each of these bands may be elaborated into a range of meanings, yet each provides a basis for grouping, and thus for excluding, certain possibilities and their associated meanings. The relevant or primary versions of the statutory function are: (1) purely prohibitive, (2) prohibitive

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[7]The purely prohibitive and wholly affirmative versions of the statute define two natural extremes. The two other versions, which occupy the middle range of the spectrum, constitute first-level "blends" of these extremes, and in that sense are primary. It is possible to mix the affirmative and prohibitive dimensions differently, and thus to obtain other first-level blends, but the versions described here not only achieve a natural logical division, but also track the lines of divergence in the courts and are therefore particularly useful for evaluating the cogency of the arguments in each camp. *Compare, e.g., Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984) (limited accommodation required) *with Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985).

[8]We use the term "bands" to evoke the metaphor of the color spectrum, which simply illustrates the dual nature of the spectrum of functions discussed here. Like the color spectrum, which is continuous and yet may be divided into bands of primary colors, so the spectrum of possible functions may be broken down into four primary alternatives which are discrete when viewed at one level of abstraction but continuous when viewed at another. The metaphor does not, however, exactly capture the concept under discussion, for the primary bands discussed here are not primary in the same sense that primary colors are. Primary colors are so denoted because they constitute pure forms of color from which all other colors are derived. The characterizations of functions are primary, not because they are pure, but because they are the first groupings to appear as one moves to a level of abstraction at which groupings can be perceived.

emphasis, (3) affirmative emphasis, and (4) wholly affirmative commitment. Elaborating the range of meanings suggested by each primary grouping clarifies that only version (3) comes close to approximating the congressional intent behind Title VII. Yet the school board's position is easily characterized as one that would fall within version (2). By contrast, Respondent's proposed accommodation fits comfortably within version (3). The following elaboration of these versions thus demonstrates why the decision of the court below must be affirmed.

### B. The Four Competing Versions Of Title VII And Their Associated Ranges Of Meaning.

Version (1). *Purely Prohibitive.* A purely prohibitive measure would require employers only to avoid singling employees out on the basis of their religion for special negative treatment. For example, it would prevent an employer from denying an employee promotions on account of his religion. The focus of such a statute would be eliminating religious animus or prejudice. A world that was religion-blind would satisfy such a statute. Hence, a purely prohibitive measure would not require any special accommodation of religious employees, except to the extent that the failure to accommodate could be shown to be motivated by religious prejudice. There is, of course, no question that Congress intended to require more of employers than this, at least after 1972.

Version (2). *Prohibitive Emphasis.* A second major view of the statute would emphasize the prohibitive dimension just discussed, but would recognize a basic affirmative duty to make available some accommodations, if such accommodations could be achieved by the employer without incurring any more than *de minimis* costs. As a definitional matter, this version is distinguished from version (3) not so much by the degree of accommodation required, but by the degree of solicitude expected.

Specifically, it would not require the employer to exhaust the possible means of accommodation, or even thoroughly to explore them. It would require that at least *some* accommodation be provided, but it would stop (somewhat) short[9] of requiring that *any* reasonable accommodation proposed by the employee be accepted. It would leave to the discretion of the employer, rather than to the employee, the decision as to how to accommodate the religious needs of the employee.



The logic of Congress's commitment not only to eradicating religious discrimination, but also to sustaining a modicum of religious pluralism, makes this category clearly underinclusive with respect to the duty to arrange accommodation for employees, though it is certainly much closer to the mark than version (1). This logic is best explicated in connection with the definition of version (3).

Version (3). *Affirmative Emphasis.* While version (2) contained an affirmative component, version (3) would emphasize an affirmative commitment to a modicum of religious pluralism. This version of the statute would obligate an employer to engage in any form of accommodation that would significantly minimize the burden on an employee's religious belief or practice, with the important limitation that no accommodation involving greater than *de minimis* costs would be required.[10] This follows almost

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[9]How short would be a matter of interpretation. It should be emphasized that the categorical approach does not deny the need for interpretation within categories or versions. Yet there is obviously tremendous value in being able to evaluate and distinguish whole classes of interpretations in terms of their compatibility with the purposes of the statute more broadly conceived.

[10]The *de minimis* limitation pertains only to the cost to the employer, not to the benefit received by the employee. It does not imply that an employer would be required to accommodate an employee only partially and not fully. *See Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977) (denying accommodation that would have given guarantee of Sabbath to employee). The issue in each case is whether a full accommodation, such as the guarantee in the *Jordan* case, would result in undue hardship on the employer. In some cases it obviously will, *cf. Kendall v. United Air Lines, Inc.*, 494

directly from the 1972 amendment to the definition of religion in Title VII which requires an employer to accommodate:

> "all aspects of religious observance and practice . . . unless [the employer] demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

42 U.S.C. Section 2000e(j). The apparent purpose of the statute is to require employers to do whatever they can do, without substantial cost, to accommodate religious employees.

In distinguishing the various versions of the statute, we have thus far been implicitly dealing with the hypothetical case in which the possible forms of accommodation are equally burdensome (or nonburdensome) to the employer, from the standpoint of "real" costs. By real costs, we mean those costs which, if substantial enough, would amount to undue hardship, as opposed to other kinds of burdens which, though real enough to offend at least the aesthetic sensibilities of the employer, could never amount to undue hardship.[11]

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*(footnote 10 continued)*

F.Supp. 1380 (N.D. Ill. 1980) (full accommodation would have eroded seniority provisions of collective bargaining agreement); *Wren v. T.I.M.E. -D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979), but in others it may not. *See Brown v. General Motors Corp.*, 601 F.2d 596 (8th Cir. 1979). The hardship on the employer may be a function of many factors, including the size of the business and the relative dependence upon the employee-claimant, *cf. Wren*, 595 F.2d at 444 (reduced work force made accommodation more difficult) *with Brown*, 601 F.2d at 961 (accommodation would affect four out of 1200-1600 employees), but is not affected by the perception that the employee is getting an unusually good deal.

[11]It is unnecessary to attempt an explication of what particular things might count as "real" and what might be more properly classed as aesthetic, for though there might be disagreements of taxonomy on this point, it is important for present purposes only to sustain the concept of such a distinction. Obviously, certain kinds of costs, such as the fact that employees may grumble about an accommodation, are not statutorily relevant.



Yet given this hypothetical case, there would by definition be no "real" reason for the employer not to make available whatever form of accommodation minimized the burden on the employee's religion. Indeed, the only reason not to accept an accommodation proposed by the employee, as an alternative to one proffered by the employer, would be the aesthetic sensibilities or mere discretion of the employer. It is hard to see why such a reason should count for much at all, but it is in any event clear that it could not count enough to justify a burden on the employee's religion.

If there is a reason to justify an employer offering one and not another accommodation, it must be that the accommodations differ in terms of the real costs of each to the employer. Certainly, no one would begrudge an employer the right to choose, from among several accommodations resolving the conflict between the employee's religion and his job, the one that involved the least cost. Yet if having made such an accommodation, the conflict is seen to recur or continue, albeit in a less severe form, the employee would in theory be entitled to bring a new claim under Title VII alleging a burden on his religion and demanding an accommodation. This process of claim and accommodation would then theoretically continue, until either the conflict were fully resolved or the employer could repel the demand with a counterclaim of undue hardship. Hence, the assertion of cost as the rationale for withholding one accommodation and proffering another will be either unnecessary or unavailing, unless it can be rehabilitated into a claim of undue hardship. It will be unnecessary if the lower cost accommodation resolves the conflict, but unavailing if it permits the generation of a new claim.

It might be argued that requiring employers to accommodate religious employees to this extent would violate the establishment clause. The short answer is that the undue hardship limitation prevents such acccommodation from ever rising to the level of an establishment clause problem.[12] Indeed, undue hardship performs a function in the Title VII context similar to that performed by the compelling interest test in the free exercise clause context.[13] The compelling interest test is one of the doctrinal safety valves which prevents the free exercise clause from overreaching its purposes and offending establishment clause values.[14] The undue hardship limitation plainly distinguishes this version of the Title VII standard from the absolute accommodation requirement in *Thornton v. Caldor*, 105 S.Ct. 2914 (1985).

Moreover, to invert the argument and extend it one step further, the version of accommodation suggested here follows from the undue hardship limitation by virtue of

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[12]Affirmative efforts to accommodate religion are not *per se* inconsistent with the establishment clause and may indeed be required by the free exercise clause in some contexts. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (981); *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970) (the "limits of permissible state accommodation are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.") (Citations omitted); Note, *Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 Yale L.J. 1196, 1201 n. 28 (1982) (discussing relationship between accommodation of religion and establishment clause).

[13]The compelling interest test was first formaily announced as a free exercise clause test in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[14]In fact, recognizing this connection, though we think misapplying it, the Third Circuit in *Williamsport Area School District v. Bender*, 741 F.2d 538, 562 (3rd Cir. 1984), held that the state's compelling interest in protecting establishment clause values was sufficient to override the free exercise claims presented there.



the same logic that makes the least restrictive means formulation a necessary corollary to the compelling interest test in the free exercise context. *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 466-68 (1969). Thus, in the free exercise context, for the state to argue that a compelling interest requires a burden on religion is necessarily also to argue that the compelling interest cannot be achieved through some less burdensome means. Unwillingness to employ an alternative less burdensome means of achieving the compelling interest would demonstrate that the state's interest was actually in the means employed, and not in the interest asserted.

To characterize it in a way that most powerfully suggests the analogy, the compelling interest represents a cost that the state must avoid incurring. The least restrictive means requirement merely says that the state should accommodate religious interests whenever it can actually do so without incurring this cost. For the same reason, if an employer is unwilling to accept a proposed accommodation that is less burdensome to the employee but would not result in undue hardship, the employer's concern must be something other than cost. Indeed, such facts raise an inference of discriminatory intent. Yet while there may be other explanations, they would not be statutorily relevant, because the statutory limit is framed in terms of cost.

Thus, it may be seen that the standard imposed upon employers by the second version of the statute, which permits an employer to withhold some accommodations, apart from a defense of undue hardsnip, clearly falls short of the standard intended by Congress. It remains, then, only to consider whether the fourth version more closely approximates congressional intent than the third.

Version (4). *Wholly Affirmative Commitment*. This version of the statute would include any interpretation that viewed accommodation of religious interests as important enough to justify imposing upon employers greater than *de minimis* costs. The most extreme sub-version of this

category would view accommodation as an absolute requirement, regardless of cost. The statutorily mandated accommodation of Sabbatarians invalidated by this Court in *Thornton v. Caldor*, 105 S.Ct. 2914 (1985), would be an example of such an extreme sub-version. Although Congress contemplated that employers would incur some minimal cost in accommodating employees, Congress clearly did not envision a wholly affirmative commitment.

The third version of the statute is, therefore, the only one that corresponds to congressional intent. The first and second versions are too underinclusive with respect to the accommodation required, while the fourth just as clearly overreaches the congressional purpose and, at least in its most extreme sub-versions, runs afoul of the establishment clause.

### C. Petitioner's Justification For Not Accommodating Respondent's Religious Practices Constitutes A Classic Statement Of The Second Version Of The Statute And Suggests An Understanding That Is Structurally (Not Merely Qualitatively) Distinct From The Version That Corresponds To Congressional Intent.

The school board's argument in this case is quite clearly an argument for the second version of the statute. A part of their argument mistakenly assumes the only alternative to be the fourth version. In reality, there is, as it were, a middle road, which is the third version articulated above.

The school board argues that the three days of paid leave provided for religious observance, together with the allowance of additional days of unpaid leave for any additional religious observance, is a reasonable accommodation. *See Philbrook*, 757 F.2d at 484. Thus, the school board argues that it need not consider other, less burdensome means of accommodating Respondent's religious beliefs, for the reasonable accommodation it has proposed, while not the least burdensome, is sufficient to



satisfy the statute. In so doing, the school has advanced a classic statement of the second version of the statute. As we have seen, however, the only relevant question is whether the less burdensome accommodations would impose an undue hardship on the school. *See also Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

It is difficult to see how allowing Respondent to use leave allocated to the personal business category for religious observance would result in undue hardship. If the school is willing to allow him three days to attend charity meetings, to work on personal financial matters, or even perhaps to go fishing, it is hard to understand how they can invoke undue hardship in response to a proposal that he use the three days for religious observance instead. Indeed, they could not reasonably make such an argument, and thus, are forced to seek shelter within the umbrage of a version of the statute that does not obligate them to make such accommodations available in the first place.

It is perhaps a closer question whether the employment of a substitute teacher results in undue hardship. Yet this should not be relevant either, for the school is apparently willing to allow him to employ a substitute during his unpaid leave. They are balking, then, not at employment of the substitute, but at paying him his full salary, and allowing him to bear the burden of the additional cost of hiring a substitute. Paying him full salary merely continues the status quo. There thus does not appear to be any basis for an undue hardship claim here. The real issue in this case is not, therefore, undue hardship but whether the statute obligates employers to do more than propose *a* reasonable accommodation. Because it plainly does, the decision of the court below must be affirmed.

Respectfully submitted,

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